business of the other element -- regulating under or enforcing the law to be violated." (App. F pg. 11 & 14). In relevant part, "Roberts produced no evidence that the persons to whom she reported the CT purchase process were 'appropriate law enforcement authorit[ies]' as defined by" the Act. (Br. of App. pg. 7).

The Hospital based its argument in both Courts, upon *Texas Department of Transportation v. Needham*, 82 S. W. 3d 314 (Tex. 2002) and *City of Houston v. Kallina*, 97 S. W. 3d 170 (Tex. App. - Houston [14th Dist.]). (R.R. at 8-9; Br. of Appellee pg. 18-19). Petitioner argued *Needham* was "not on point" and that *Kallina* supported reports other than "reports of criminal violations." (App. F pg. 15; S. J. Resp. pg. 4). The Hospital argued the *Needham* case "directs this Court to focus on enforcement of the particular law reportedly violated when making the determination whether the report was made to an 'appropriate law enforcement authority'". (Br. of App. pg. 18). The Hospital also argued the *Kallina* case as persuasive authority that even though "[a]lmost any supervisor has a duty to keep departmental property from disappearing, and report or discipline subordinate employees if it does", the Hospital is not an appropriate authority under the Act "solely because the Hospital's Board of Managers has authority to regulate and investigate the conduct of Hospital employees and to carry out internal disciplinary procedures". (Br. of App. pg. 19).

The Sixth Court of Appeals after oral argument found:

> "[We] will not conclude Roberts was barred from taking the good faith position that the Hospital was engaged in activities outside the bounds of the law. We also recognize that yet another oddity exist here: the Hospital did not ultimately carry through with its purchase outside the bounds of competitive bidding, but withdrew the purchase order. It appears the Hospital did then submit the purchase to competitive bidding and purchased the scanner recommended by Roberts."...
>
> "In this case, taking all allegations in the light most

favorable to the nonmovant, Roberts simply did not report the alleged violation to an appropriate law enforcement authority."...

"Therefore, under the statute, Roberts has neither pled nor provided summary judgment proof of facts that would support this required element of the action, and a no-evidence summary judgment was properly rendered on this basis." (App. A pg. 9-12).

The Supreme Court of Texas denied Petitioner's Petition for Review. (App. C). Petitioner filed a Motion To Take Judicial Notice of Documents (six documents) in conjunction with her Motion for Rehearing From The Denial Of Petition For Review in the Supreme Court, specifically, the Act's definition of "law"; the Hospital's administrative policy requiring Board approval for the procurement of goods and services in excess of $100,000.00; the legal notice published in the Mount Pleasant Daily Tribune on March 14, 2001, of the Hospital's request for a proposal for a CT scanner; a request for funds of $1,200,000.00 for the purchase of a CT scanner; and the judicial admission before the Court of Appeals that "the Hospital prescribes its methods in purchasing." (Mot. Reh. Denial Pet. Rev.). Petitioner's motion was dismissed as moot, since Petitioner's Motion For Rehearing From The Denial Of The Petition For Review was denied. (App. D). Petitioner argued in her Supreme Court Petition and Motion For Rehearing, the constitutional challenge of the Act. (Pet. Rev. pg. 19-20; Mot. Reh. Denial Pet. Rev. pg. 14-15).

The issue before this court is whether the Texas Whistleblower Act (V.T.C.A. Tex. Govn't Code §554.002) is facially vague and/or vague as applied, to the detriment of constitutional rights protected by the First and Fourteenth Amendments, effectually condemning speech and privileges, due to the Act's lack of definitive standards and the Courts arbitrary enforcement. Does the Act's phrase, "appropriate law enforcement authority", as interpreted and applied by the courts to establish two categories

of reports – one report made in good faith to the governing Board of Petitioner's employer of a violation of competitive bidding requirements, technically classified as a civil law and worthy of protection from retaliation – or the same report made in good faith to the same governing Board of Petitioner's employer of the same competitive bidding requirements, technically classified as a criminal law and not worthy of protection – limit Petitioner a remedy for her injury by due course of law and deny her equal protection under the law from retaliation for reporting violations of law. Is the judicial decree establishing this classification of reports, based on section § 554.002 (b) of the Act rationally related to the State's interest "to enhance openness in government and compel the government's compliance with law by protecting those who inform authorities of wrong doing"[1] or do such judicial decrees offend the First Amendment and "lead to the suppression of free expression".[2] In light of the Courts finding the authority receiving the report did compel observance of or obedience to the law alleged to be violated, or investigated the sequence of events, was justice served to deny Roberts her day in Court before a jury? (App. A at 9-10 footnote #4).

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[1] *Castaneda v. Tex. Dept. of Agric.*, 831 S.W. 2d 501, 503 (Tex. App. - Corpus Christi, 1992, writ denied). (App. A at 7).

[2] National Endowment for Arts Et Al. v. Finley, 000 U.S. 97-371 (1998)

ARGUMENT

Is the Texas Whistleblower Act facially vague or vague as applied by the Courts in the case at bar, effectually condemning speech and privileges protected under the First and Fourteenth Amendments due to its lack of definitive standards and the encouragement of arbitrary enforcement; and accordingly, does the Act's operative terms, clauses, and phrase, "appropriate law enforcement authority", as construed and applied by the courts in this and other cases, to establish two categories of violation of law reports – thus, necessarily claimants – one protected and one not, rationally to the State's interest and limit Petitioner and other whistleblowers equal protection and a remedy for injuries guaranteed by due course of law when the Act reasonably admits of a different meaning? See Whistleblower Act in the Appendix at E.

A. "The Act evidences two legislative purposes: (1) to protect public employees from retaliation by their employer when, in good faith, employees report a violation of the law, and (2) in consequence, to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies." *City of Austin v. Ender*, 30 S. W. 3d 590, 594 (Tex. Ap. - Austin 2000, no pet.); *Travis County v. Colunga*, 753 S. W. 2d 716, 718-19 (Tex. App. - Austin 1988, writ denied). "Because the Act is remedial in nature, it should be liberally construed to effect its purpose." *Castaneda v. Texas Dept. of Agriculture*, 831 S. W. 2d 501, 503 (Tex. App. - Corpus Christi, 1992); *Davis v. Ector County*, 40 F. 3d 777, 785 (5th Cir. 1994)." (App. A pg. 8). "A liberal construction does not restrict the statute, but enlarges its scope and effect to effectuate the true legislative purpose." *Castaneda Id.* at 503. *See Burch v. City of San Antonio*, 518 S. W. 2d 540, 544 (Tex. 1975) (remedial statutes shall be given the most comprehensive and liberal construction, possible).

Petitioner argued in her Reply Brief, the Court should not determine the case at bar without first considering the facial construction of the Act because it was vague (App. Reply. Br. pg. 15). "A law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U. S. 41, 56-57 (1999). "The section in question must be judged upon its face." *Thornhill v. State of Alabama*, 310 U. S. 88 (1940). "So long as the fundamental law guarantees the right of a person to do a given act, that act cannot be effectually condemned either by statute or judicial decree." *Ex Parte Henry* (1949) 147 T. 315, 215 S.W. 2d 588. (App. Reply Br. pg. 14-15).

Petitioner beseeches this Court to utilize its supervisory power for the protection of the fundamental constitutional rights of all whistleblowers under the Act, and declare section §554.002 (b) of the Texas Whistleblower Act facially unconstitutionally vague and/or vague as applied and authoritatively construed, like in the case at bar and *Kallina*[1], because it effectually silences or condemns protected speech, with the further result whistleblowers are limited or precluded a remedy for their injury when reporting violations of law by their employer to officials of the employing governmental entity; and such cannot be justified as being rationally related to the State's interest, "to enhance openness in government and compel the government's compliance with law by protecting those who inform authorities of wrong doing". *Castaneda*, Id. at 503.

The Whistleblower Act is only applicable to the employee/employer context – a fact the courts have failed to rationally apply in deciding cases – and as such it should be "liberally construed" in a rational manner to apply the statute's meaning to that context accordingly without placing employees with a duty to report violations of law within the employee context in a conundrum. *Castaneda Id.* at 503; V.T.C.A. Govn't Code §554.

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[1] *City of Houston v. Kallina*, 97 S. W. 3d 170; 176 (Tex. App. - Houston [14th Dist.]

B. While the Act defines "law" to mean: (A) a state or federal statue; (B) an ordinance of a local governmental entity; (C) or a rule adopted under a statute or ordinance (V.T.C.A. Govn't Code §554.001; App. E), it does not define "ordinance", which is defined as: (1) An authoritative command or order; (2) A custom or practice established by long usage; (3) A statute or regulation (*The American Heritage College Dictionary*, Houghton Mifflin Co. pg. 979 (4th ed. © 2002). Nor does it define the term "adopted", which according to the dictionary is defined as: (1a) To take and follow; (b) To take up and make one's own; (2) To vote to accept; (3) To choose as standard (*A.H.C.D. Id.* pg. 18). (App. Rep. Br. pg. 13; App. E).

As the Act stands, the employee is left blindly to follow rules not knowing if they are law or what the courts may arbitrarily construe to be unprotected internal policy, as in *City of Houston v. Kallina*, 97 S. W. 3d 170 (Tex. App. - 2002, Houston [14th Dist.] 2002, pet. denied). (App. Reply Br. pg. 13). In *Kallina*, the Court of Appeals reversed a jury verdict in a Whistleblower case relating to violations of the city's fixed-asset policies, which *Kallina* believed to be law. *Kallina, Id.* Two justices in the *Kallina* Appeals Court en banc dissenting opinion concluded, the "Act does not require that the policies explicitly state that they are adopted under an ordinance, nor does it require that the ordinance explicitly give rule-making authority to the entity that made the rule." *Kallina, Id.* at 175-179.

Poor Mr. Kallina, who followed his departments policy and procedure manuals, who believed they were law under the Act, who reported missing inventory in excess of $400,000.00 to his supervisor, whom under the Act he believed was the appropriate law enforcement authority, for which even though a jury determined he got fired for his report, and his report was not motivated by reason of personal benefit outside his duty to his employer under the law for the public good, the Court found the Act could not protect him, due in part to the fact the Policies manual issued by the City Controller and the Mayor, and the Procedures manual issued by the Director of Finance, "reflected internal policies rather than rules promulgated

pursuant to an ordinance. That is not enough." *Kallina, Id.* at 176.

All departmental policy commands, orders, customs, practices of long use, and regulations of general applicability meet the definition of "ordinance", and when "chosen as standard" (adopted) by the powers that be, they would be viewed as the "law" under the Act, through the eyes of a reasonable employee when faced with the decision of whether to make a report or keep silent. *A.H.C.D., Id.* (App. Reply Br. pg. 13). See the Texas Govn't Code Construction Act, Sub. B §311.011 (a) which states, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." (Acts 1985, 69th Leg., ch. 479, § 1, eff. Sept. 1, 1985).

Speech, in the interest of the public good is effectively silenced when an employee is left without direction as to what policies are law under the Act, thwarting the Texas legislature's intent to use public employees for watch dogs to expose corruption if an employee does not feel it is reasonably safe to make a report, knowing she may invoke the protection of the Act if the need arises. (*See Brock v. Roadway Express, Inc.*, 481 U. S. 252, 259 (1987), a retaliation case for reporting safety violations discussing how, "Congress recognized employees in the transportation industry are often best able to detect safety violations" and so enacted a law "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles."). "What counts for purposes of vagueness analysis, however, is not what the Ordinance is 'designed to prohibit,' but what it actually subjects to criminal penalty...."; likewise, what reports of violations of law, acted upon by way of regulation, enforcement or investigation in accordance with the requirements of the law alleged to be violated, as in the case at bar and *Kallina*, are subject to no protection under the Act? (*Morales, Id.* Justice Scalia dissenting opinion at IV ¶2).

C. The Act does not require or stipulate by what manner a state or local governmental entity shall disclose or give notice to

its employees which authoritative commands or orders, or which customs or practices, or which regulations[1] shall be considered "adopted" or chosen as standard – thus equated as law – and which are merely implemented – thus policy; therefore if a public employer could insulate itself from liability for the unlawful conduct of those who direct and conduct the affairs of public bodies through simply not disclosing what is law under the Act to its employees, the Whistlblower Act could not serve its purpose with the effect that speech of public concern may be effectively silenced. V.T.C.A. Govn't Code §554; (App. E).

The Fourteenth Amendment states, " [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Courts enforcement of the Act in *Kallina* narrowly construes what is law under the Act, constricting a public employees privilege to seek a remedy for their injuries, effectually condemning free speech of all possible whistleblowers, opening the flood gates for employers to forego notice of what is law under the Act to its employees; accordingly such enforcement it not rationally related to the State's interest "to enhance openness in government and compel the government's compliance with law by protecting those who inform authorities of wrong doing." *Castaneda v. Tex. Dept. of Agric.*, 831 S.W. 2d 501, 503 (Tex. App. - Corpus Christi, 1992, writ denied); *Kallina, Id.*; (App. A pg. 7).

In the case at bar, the Hospital conspicuously did not bring forth any evidence to support the purported argument, "the Hospital prescribes its methods in purchasing", to negate liability and Roberts testimony; accordingly it is not unreasonable to conclude an employer would have the same inclination to conceal the law prior to possible reports of violations of law, after all its a well known principle, corruption thrives on ignorance, and it is undisputed the Hospital concealed the Whistleblower Act from its

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[1] regulation is defined as "a principle, rule, or law designed to control or govern conduct". *A.H.C.D., Id.* pg. 1172.

employees from its enactment in 1983 until after Roberts was fired in 2002. (App. F pg. 19-20; App. A pg. 9; P. 5th Am. Pet.). See Texas Govn't Code Construction Act, Sub. C §311.023 (1) (5) which states, "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; (5) consequences of a particular construction. (Acts 1985, 69th Leg., ch. 479, § 1, eff. Sept. 1, 1985).

D. Not anywhere in the Act does the Act state "who" is an authorized person to adopt the particular ordinance or rule under an ordinance that "becomes" the law, and by what "manner" that authorized person shall make the law or whose decision constitutes a delegation of authority to establish a particular law under the Act. V.T.C.A. Govn't Code §554. Two judges in the *Kallina* en banc dissenting opinion recognized, the Act does not "require that the ordinance explicitly give rule-making authority to the entity that made the rule" and also, "there is no Texas Supreme Court authority on point." *Kallina, Id.* at 175-179. "The cardinal rule to be observed in any case involving statutory interpretation is that a court must look to the intent of the legislature and must construe the statute so as to give effect to that intent." *Knight v. Intern. Harvester Credit Corp.*, 627 S. W. 2d. 382, 384 (Texas 1982).

If the courts don't agree on the Act's undefined limits of who has rule-making authority, how might an employee who is not an expert in the law know *whose* rules constitute law, *before* the fact of making a report and not after the fact, when the courts and attorneys have time to research legal strategies and dissect what an employee failed to do to protect herself, not taking into account the employee was not thinking of protecting herself or she would have guaranteed her own protection though words not spoken; hindsight is 20/20. "[W]here a vague statue 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'" *Grayned v. City of Rockford*, 408 U. S. 104, 110 (1972).

E. The term "authority" is reasonably susceptible to more than one interpretation for which the Supreme Court has never addressed, and whether it refers to an "individual" within a specific entity or "the entity" itself, it would not be outside the scope of reason for an employee of ordinary intelligence to consider the usage note concerning the term in the *American Heritage Dictionary Of The English Language*, New College Edition, pg. 89, Houghton Mifflin Co. © 1976, that states the term is often capitalized when used with reference to the public agency with administrative powers limited to a specified field. The term is clearly referenced in the post June 1995 language with the definite article "the", where it refers to the authority as being a "part" of a state or local governmental entity – not the entity itself – which an employee could reasonably construe to refer to an individual of the employing agency. V.T.C.A. Govn't Code §554.002 (b). The fact the term is never capitalized in the Act, in conjunction with the Act's post June 1995 language, the Act reasonably admits the term refers to the individual. V.T.C.A. Govn't Code §554.002 (b); (App. E). (App. Rep. Br. pg. 9-13). "Courts ought not to interpret laws so as to nullify or impair them, when their language reasonably admits of a different meaning." *Spears v. City of San Antonio* (1920) 110 T. 618, 223 S. W. 166.

The Act plainly states the dimensions of "an appropriate law enforcement authority" shall rest in the good faith belief of the employee, as evidenced by the restrictive clause in section §554.002 (b) of the Act, therefore the two alternative phrases in subsection §554.002(b)(1) & (2) are not controlling on the issue of whether the report was made to an appropriate law enforcement authority in actuality. "In construing statutes, it is the duty of the court to ascertain the legislative intent. In determining this intent, the court should not look alone to any one phrase, clause or sentence to the act, but to the entire act itself." *Ex Parte Roloff*, 510 S. W. 2d. 913, 915 (Texas 1974).

F. The Act does not stipulate "who" authorizes the authority to

investigate or regulate or enforce the alleged violation. V.T.C.A. Govn't Code §554. Even if one examines the rest of the Act, the two alternative phrases in section V.T.C.A. Govn't Code §554.002 (b) (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law, there is no requirement that an authorized authority to investigate, regulate or enforce the law alleged to be violated, must be authorized by the specific law alleged to be violated, just as the two judges in the *Kallina* en banc dissenting opinion recognized, the Act does not "require that the ordinance explicitly give rule-making authority to the entity that made the rule." *Kallina, Id.* at 175-179.

In an analysis of the operative terms used in subsection, §554.002(b)(1) & (2) "regulate" is defined as: 1) To control or direct according to rule, principle, or law; 2) To adjust to a particular specification or requirement; 3) To adjust for accurate and proper functioning; 4) To put or maintain in order (*A.H.C.D., Id.* pg. 1172) and the term "enforce" is defined as: 1) To compel observance of or obedience to; 2) To impose; compel; 3) To give force to; reinforce (*A.H.C.D., Id.* pg. 464). The Court in *Texas Department of Transportation v. Needham*, 82 S. W. 3d 314 (Tex. 2002) held "the statutory definitions limiting language-- regulate under, enforce, investigate, and prosecute-- does not include an employer's power to internally discipline its own employees for an alleged violation", when determining whether the report was made to an appropriate law enforcement authority; however, in the *employee context*, this power to punish often goes hand in hand with the power to investigate and compel observance of or obedience to the law alleged to be violated and the mere existence of the first does not negate the second as a valid authority, a fact the *Kallina* and *Roberts* Courts arbitrarily chose to negate. *Needham, Id.* at 322; *Kallina,* Id. at 175; (App. A pg. 11). If the courts can arbitrarily enforce the law in such a manner, then the section in question is void for vagueness on its face because it offends the Fourteenth Amendment. V.T.C.A. Gov't Code §554 (b); (App. E).

The Court found the Act could not protect *Kallina* because his supervisor "did not constitute" an appropriate law enforcement authority "within meaning of Whistleblower Act." *Kallina, Id.* The court went on to say, "Without question, Kallina had a duty to report possible theft ... to his supervisor. That was his job. The legislature might have drafted the Whistleblower Act to provide immunity for all reports governmental employees make to their supervisors, but it did not. Instead, it protected only reports made to appropriate law enforcement authorities." *Kallina, Id.* at 176.

The Court, recognized Roberts' reports relating to "her efforts to professionalize her department" ... "to maintain or create a professional, safe, and fairly administered work environment". (App. A pg. 8). Roberts, like *Kallina* had a professional duty to report such events to Hospital officials that made the Hospital liable to patients under the Medical Liability and Insurance Improvement Act, T.R.C.S. art. 4590i and to report events creating a foreseeable risk of harm to patients under the common law, yet the Court determined the Act could not protect her stating, "Roberts simply did not report the alleged violation to an appropriate law enforcement authority." (App. A pg. 11; App. App. Br. pg. 35). See *Warnock v. Pecos County, Texas*, No. 96-50869 (5th Cir. 1997) a Texas whistleblower case where the court determined, "[w]hen a public employer grants an employee the the task of serving as ombudsman within a particular field, it may not fire that employee for accurate and thorough criticisms of the relevant governmental practices."

"A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application. ... Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U. S. 104, 110 (1972). *Kallina*, and the case at bar are perfect examples of how the Act is facially unconstitutionally

vague, when it encourages speech on matters of public concern relating to violations of law by their employer, through the promise of protection, but fails to adequately define the qualifying criteria though which an employee may judge an authority to be an appropriate authority to make the report too, to claim the remedy, or be found to be outside the protection of the Act, a risk that many may perceive to be too great to even make a report. V.T.C.A. Tex. Gov't Code §554.002 (b); *Kallina, Id.*; (App. A pg. 9). The Act's lack of definitive standards and the courts literal construction of the Act, coupled with the lack of a law library, fragmented information, and a heightened mental state, the employee is the one faced with "resolution on an ad hoc and subjective basis", to obtain a remedy for her injury. *Grayned, Id.* at 110.

"Employees are likely to limit their behavior to that which is unquestionably safe, for the threat of dismissal from public employment is a potent means of inhibiting speech. That this Court will ultimately vindicate an employee if his speech is constitutionally protected is of little consequence - for the value of a sword of Damocles, is that it hangs - not that it drops. For every employee who risks his job by testing the limits of the statute, many more will choose the cautious path and not speak at all." *Arnett v. Kennedy*, 416 U. S. 134 at 231 (1974).

G. In the legislative history of the original enactment of the Texas Whistleblower Act in 1983, by the passage of House Bill 1075, Senate sponsor,

> "Senator Edwards gave a very general explanation.
> EDWARDS: This bill would simply give protection to state public employees... This is a protection that federal employees have had for a number of years now. I think it makes sense. And at time when we are trying to encourage open and honest government to let *employees be guaranteed* the fact they will not be fired if they carry out their *responsibilities as a public citizen, as a public employee, to report*

violations of the law. [Ibid.] ". (emphasis added)
(Legislative Intent Research Report, App. Br. Ex. 1).

In 1989, the Act was amended by passage of HB 1405, mandating that whistleblowers had to go through the grievance procedure before filing suit, during which the House Labor and Employment Committee heard testimony in favor of the bill from Keith Stretcher, Assistant City Manager of Midland;

"He offered four reasons for adding the grievance procedure as taken from court decisions he had reviewed.

STRETCHER: First, to let the agency develop necessary factual background upon which decisions should be based. Two, to conserve scarce judicial resources since a complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene. Three, to give the agency a chance to discover and correct its own errors. Fourth, to avoid the possibility that frequent and deliberate flouting of the administrative process could weaken the effectiveness of the agency. [Ibid.]."
(Legislative Intent Research Report, App. Br. Ex. 1).

The amendment to the grievance procedure clearly supports the argument the legislature intends the governmental entity to have the chance to properly address alleged reports, no matter the source of the law. (App. Rep. Br. pg. 14-15)

In oral argument, Petitioner beseeched the Court of Appeals to consider the employee/employer context, with the argument:

ROBERTS: "The majority of employees are not within the decision making cabinet and are rarely privy to all the internal decision making processes, to even know the full scope of ramifications from the information that they do know. That

is why the chain of command is so strictly viewed as insubordination if challenged. To *Kallina*, a report of missing inventory, was just that, missing inventory. Not necessarily stolen, maybe transferred, maybe borrowed. Only one in authority with access to know the full scope of events would have known.

There is no balance, between the employees right to make a report and the employers right to protect itself, when the court requires an employee to ignore the chain of command in one set of circumstances, when only bits and pieces are known, and yet require the employee to follow it in another, when facts become clear. A liberal construction of the Act requires it to be construed in a manner to support the legislative intent and not create more havoc." (C.O.A. Oral Argument; App. F pg. 4-5).

In subsection §554.002(b)(1) & (2), the use of the term "or" is used as an alternative and not as a term limited to the second alternative, giving the employee the *right* to choose between the two. (See *A.H.C.D.* pg. 977). The Act's statutory language in this section does not mandate a required course of action in the employee's choice of one alternative over the other, but leaves that to the employee's good faith belief in the person's authority receiving the report, to at the very least have the authority to investigate the actions of its employees if a criminal law is involved, or on the other hand, *permission to bypass the governmental entity.* See *Castaneda*, where the Court determined an appropriate authority was an authority "with the capacity through legal processes or otherwise to take remedial action with respect to the alleged violation." (*Id.* at 504). The Court went on to say, "this interpretation is necessary to realize this statute's remedial purpose: to foster governmental compliance with the law". (*Id.* at 504).

One can imagine how some criminal law violations, at the top of the food chain, could imperil more than ones livelihood, but one's life; thus this alternative should be liberally construed for the protection of the employee and not narrowly constricted and applied by the courts to

establish two categories of reports – criminal and non-criminal – one protected and one not protected, thus one employee protected and one employee not protected when the employee makes a violation of law report in good faith to the governing board of the employing agency, as in the case at bar and *Kallina*. Such judicial decrees deprive Petitioner and others like her, of their Fourteenth Amendment right to equal protection of the laws and a remedy for their injury grounded in state law; after all, a report of a violation of law is just that, a report of a violation of law and in Texas a statute is presumed to be enacted in "compliance with the constitutions of this state and the United States" with "a just and reasonable result". Tex. Govn't Code Construction Act §311.021 (1)(3). It is not a just and reasonable result to protect one employee from retaliation and not the other, for reporting a violation of law by the employer to the governing employer officials based on the fact one law report was civil and the other criminal, when the employee may not know the difference as in the case at bar. (Tr. Ct. Rep. Rec. at 17). See *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 424 (1982) where the courts established two categories of remedies based on procedures that were not justified because they were not rationally related to the States legitimate governmental objectives.

"[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Logan, Id.* at 433; *Vitek v. Jones*, 445 U. S. 480 at 490, 491, (1980) quoting *Arnett v. Kennedy*, 416 U. S. at 167 (opinion concurring in part). In identifying "the precise nature of the Equal Protection Clause's guarantees", the Court at the minimum level, "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Logan, Id.* at 440; *Schweiker v. Wilson*, 450 U. S. 221, 230 (1981). Employer retaliation is *strictly* forbidden or the legislature would not have disallowed a mixed motive affirmative defense to offenders, therefore the courts to classify employees remedy based on the technical classification of the law alleged to be violated rather than the conduct of the violator, is not rationally related to the Act's

two legislative purposes: (1) to protect public employees from retaliation by their employer when, in good faith, employees report a violation of the law, and (2) in consequence, to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies." *City of Austin v. Ender*, 30 S. W. 3d 590, 594 (Tex. Ap. - Austin 2000, no pet.); *Travis County v. Colunga*, 753 S. W. 2d 716, 718-19 (Tex. App. - Austin 1988, writ denied); See V.T.C.A. Govn't Code §554.004(b) where adverse personnel action must be based "solely" on unrelated whistleblower activities.

H. The Court in *Texas Department of Transportation v. Needham*, 82 S. W. 3d 314, 321 (Tex. 2002), based on subsection §554.002(b)(1) of the Act, determined "the particular law the public employee reported violated is critical to the determination" of the appropriate law enforcement authority. In the case at bar, the specific law was never identified by its technical term – Roberts was not a law expert – and because the Court found the law was complex, coupled with the Hospital's careful avoidance in stating "no law was violated", the Court of Appeals did not bar Roberts "from taking the good-faith position that the Hospital was engaged in activities outside the bounds of the law." (App. A at 9). In the "employee context", any employee like Roberts would reasonably believe in the authority of the employers' officials such as the governing Board of Managers to have control over the sequence of events involving their employees, to compel observance of or obedience to the competitive bidding requirements whether of federal, state, or local governmental origin; or to control or direct events accordingly; or to investigate such allegations, since the "statute's remedial purpose: to foster governmental compliance with the law ", would be realized regardless of whether it is a criminal or civil law violation. V.T.C.A. Tex. Govn't Code §554.002; *Castaneda, Id.* at 504. (App. Br. at 55)

It is axiomatic that to investigate, regulate, or enforce a law for purposes of an alleged violation and not for purposes of education

or the making of new law, etcetera, is to investigate, regulate, or enforce the sequence of events as carried out by people, after all, a law does not violate itself. Because the violations of concern are perpetrated by an employee and the sequence of events can only be changed through the employee's conduct, then it is the employee's conduct that must be investigated, regulated or enforced to change the sequence of events; therefore, it is only reasonable an employee would believe employer officials over that employee would be an appropriate choice to carry out that mission, regardless of whether disciplinary actions for misconduct may or may not reside with that official. The Court in *Needham* recognized the Act does not cover reports for purposes of "discipline". *Needham, Id.* at 321. The *Needham* Court did not denounce reports for purposes of conduct, after all, "regulation" is defined as "a principle, rule, or law designed to control or govern conduct". *A.H.C.D., Id.* pg. 1172. The focus of the *Needham* Court was internal "disciplinary" policies, not internal policies. *Needham, Id.*

The Texas Supreme Court in *Wichita County, Texas v. Hart*, 917 S. W. 2d. 779 (Tex. 1996), grappled with an appropriate definition of "good faith" and the legislative intent in whistleblower cases. The *Hart* Court likened the balancing of public and private concerns in the official immunity context as illustrating an appropriate approach for "good faith" in the whistleblower context. *Hart, Id.* In articulating a balance between the employee's right to report illegal activity with the employer's right to discipline for insincere or objectively unreasonable reports, the Court adopted a definition for "good faith" and articulated a policy rationale to ensure the employee's belief was not insincere or objectively unreasonable. *Hart, Id.*

The fact the Hospital acted upon Roberts' reports, demonstrates the Hospital believed she was sincere and that she gave them enough objectively reasonable information at the time to change the course of events. (App. A at 9). A true report is probative of good faith in and of itself, the same as in a case of libel, "truth or

substantial truth is an absolute defense to a libel action". *ABC, Inc. v. Shanks*, 1 S. W. 3d. 230 (Tex. App.- Corpus Christi, 1999). "In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the common law or former statutory provisions, including laws on the same or similar subjects." Tex. Govn't Code Construction Act § 311.023 (4).

The policy rationale case law developed requiring a showing of "good faith" beyond declaratory statements in the context of the Act's subsection (a), increases the burden on the plaintiff to *protect* the employer from insincere or objectively unreasonable reports and the Texas Supreme Court in *Needham* determined the same policy rationale applied to the terms usage in the context of subsection (b). *Needham, Id.* at 321-322; V.T.C.A. Tex. Govn't Code §554.002 (a)(b). Therefore, the Texas Supreme Court recognized the requirement of the employees "good faith" belief in an authorized authority and his right to choose the authority is balanced by the right of the employer to protect itself; accordingly, first, to let the agency develop necessary factual background upon which decisions should be based; to give the agency a chance to discover and correct its own errors; to avoid the possibility that frequent and deliberate flouting of the administrative process could weaken the effectiveness of the agency. (House Labor and Employment Committee Hearings, Legislative Intent Research Report, App. Br. Ex. 1). *Needham, Id.*.

When the employer acts on a true report with compliant measures, they are no longer in need of protection and when an authority who takes the information reported and has the "capacity through legal processes or otherwise to take remedial action with respect to the alleged violation", then they are an appropriate entity. *Castaneda, Id.* at 504.

CONCLUSION & PRAYER

For the foregoing reasons, Petitioner prays the Court will grant this Petition for Writ of Certiorari, request briefs from the parties, set this case for oral argument, and after oral argument, sustain Petitioner's issues presented for review, reverse the judgment of the Appellate Court and remand this case for further proceedings not inconsistent with this Court's opinion, pending a determination that Petitioner's claim is meritorious.

Thank you for your time and attention to this issue that is of great importance to the jurisprudence of all future whistleblower cases in the State of Texas.

Respectfully submitted,

Joan Carol Ellis Roberts

Joan Carol Ellis Roberts, Pro se
65 C.R. 1044
Mt. Pleasant, Texas 75455
(903)572-9667

IN THE
SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS, Petitioner
v.
TITUS COUNTY MEMORIAL HOSPITAL

PROOF OF SERVICE

I, JOAN ROBERTS, do swear or declare that on this date, November 9th, 2005, I have served on each party to the above proceeding, Petitioner's PETITION FOR WRIT OF CERTIORARI as required by Supreme Court Rule 29 by certified U. S. Mail, return receipt requested, properly addressed and prepaid to Jeffery C. Lewis, attorney in charge for Titus County Memorial Hospital and whose address is 1710 Moores Lane, P. O. Box 5517, Texarkana, Texas, 75505-5517, telephone (903) 792-8246 and the Att. Gen. of the State of Texas, P.O. Box 12548, Austin, Tx., 78711.

Joan Carol Ellis Roberts, Pro Se
Joan Carol Ellis Roberts
65 C.R. 1044
Mt. Pleasant, Texas, 75455
(903)572-9667

STATE OF TEXAS §
TITUS COUNTY §

Before me, the undersigned notary, on this day personally appeared, Joan Carol Ellis Roberts, a person whose identity is known to me and after I administered an oath to her, upon her oath, she said the above statement contained in the Proof Of Service is true and correct and the facts contained within are within her personal knowledge.

THE UNDERSIGNED NOTARY, ON NOVEMBER 9th, 2005.

Leticia Tolentino
NOTARY PUBLIC, STATE OF TEXAS

LETICIA TOLENTINO
Notary Public, State of Texas
Commission Expires 1-25-06

APPENDIX

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APPENDIX A

STATE OF TEXAS

In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-04-00056-CV

JOAN CAROL ELLIS ROBERTS, Appellant

V.

TITUS COUNTY MEMORIAL HOSPITAL, Appellee

On Appeal from the 76th Judicial District Court
Titus County, Texas
Trial Court No. 29675

Before Ross, Carter, and Cornelius,* JJ.
Opinion by Justice Ross
*William J. Cornelius, C.J., Retired, Sitting by Assignment

OPINION

Joan Carol Ellis Roberts sued Titus County Memorial Hospital, claiming she was denied a promotion and ultimately lost her job because she blew the whistle on wrongdoing by Hospital officials. The Hospital obtained a summary judgment against her claims. Roberts represented herself both at trial and on appeal.

Procedural Issues

Roberts advances a number of procedural issues in her appeal. She contends the Hospital was required to attack the sufficiency of her pleadings to allege suit within limitations by using special exceptions rather than by pursuing a summary judgment. The cases have almost universally accepted the concept that a party may use several different procedures to reach the same result. *See Drilltec Techs., Inc. v. Remp*, 64 S.W.3d 212, 214 (Tex. App.-Houston [14th Dist.] 2001, no pet.) (holding subject matter jurisdiction can be attacked by plea to the jurisdiction, motion for summary judgment, and special exception, among other means). Indeed, there is one case assuming that, because limitations under the Texas Whistleblower Act[1] is often raised by summary judgment, then it must be raised by summary judgment. *Univ. of Houston v. Elthon*, 9 S.W.3d 351, 356-57 (Tex. App.-Houston [14th Dist.] pet. dism'd w.o.j.). Most courts have freely acknowledged that there is some confusion and considerable leeway in bringing this type

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[1] TEX. GOV'T CODE ANN. § 554.001, et seq. (Vernon 2004).

of contention, and that no single type of pleading is required to raise the issue. *See Tex. S. Univ. v. Carter*, 84 S.W.3d 787, 790 (Tex. App.– Houston [1st Dist.) 2002, no pet.).

The issue was raised by summary judgment in this case. That has repeatedly been held at least an acceptable method of raising limitations, and occasionally as the only proper method. Error has not been shown.

Roberts also contends the court, in rendering its judgment, relied on information that was not a part of the summary judgment evidence. Her position appears to be that depositions and other discovery documents attached to the motion – but not referenced or incorporated in the motion – are not proper summary judgment evidence.

Rule 166a of the Texas Rules of Civil Procedure addresses summary judgment and the evidence to be considered by the court. See TEX. R. CIV. P. 166a. The Texas Supreme. Court has interpreted this rule to mean that the summary judgment record consists of "evidence attached either to the motion or to a response." *Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995); *accord Guinn v. Bosque County*, 58 S.W.3d 194, 199 (Tex. App. – Waco 2001, writ denied); *McIntosh v. NationsBank*, 963 S.W.2d 545, 547 (Tex. App.-Houston [14th Dist.] 1997, writ denied). Thus, a trial court must grant a motion for summary judgment if the evidence attached either to the motion or to a response demonstrates the absence of any genuine issue of material fact and shows the movant's entitlement to judgment as a matter of law on the grounds set forth in the motion. *See Wilson*, 904 S.W.2d at 629.

All of the evidence of which Roberts complains was attached to the summary judgment motion. It was thus properly before the court, and this contention is without merit.

Roberts also contends the trial court erred by modifying the judgment without providing her with notice of the proposed changes. The trial court signed its first summary judgment April 6, 2004. It signed a second judgment April 20, 2004. The changes were the addition of language upholding "all of Defendant's objections" and assessing costs against Roberts. Roberts admits in her brief, and confirmed at oral argument, that the Hospital had no outstanding objections at the time the trial court signed its final summary judgment. Hence, the additional language upholding objections was mere surplusage. As for the additional language assessing costs against Roberts, the Hospital, as the successful party, was entitled to recovery of its costs. *See* TEX. R. CIV. P. 131. Because a trial court has plenary authority to modify, correct, or reform a judgment for thirty days after the judgment is signed (TEX. R. CIV. P. 329b (d), it was appropriate for the trial court to include such language in its final judgment.

Sufficiency of Hospital's Motion

Although not a specific complaint in Roberts' appeal, we note that the Hospital's motion for summary judgment is not a model for clarity. It is three pages long and is supported by a number of exhibits and a lengthy brief. The motion seeks summary judgment based on Roberts' failure to prove all necessary elements of her claims. It states that all but count one of her claims are barred by limitations under the Whistleblower Act

or that she did not file the necessary grievances required by the Act. It also states Roberts has not demonstrated that: she acted in good faith in making a report, the report involved a violation of law by an agency or employee, the report was made to an appropriate law
enforcement authority, or she suffered discriminatory or retaliatory conduct by the employer as a result of the report. The motion concludes, "Therefore, pursuant to **T.R.C.P.166(a)** [sic], there are no genuine issues as to any material fact as to the claim asserted by the Plaintiff."

The motion provides little guidance either for the trial court or for this Court in determining which arguments apply to which variation of summary judgment. Although it states there are no fact issues (one type of summary judgment), the argument made is more like a no-evidence motion under TEX. R. CIV. P. 166a(i). The attached trial brief
complains that there is no evidence, but it also takes the position that, based on the pleadings, there are no fact issues on different aspects of the allegations. The arguments advanced in that brief make it further appear the motion was intended as a federal 12(b)(6)[2] motion seeking dismissal for failure to state a cause of action, which is not a viable claim for relief in Texas state courts.

Nevertheless, the Texas Supreme Court stated in *Binur v. Jacobo*, 135 S. W. 3d 646, 651 (Tex. 2004), that, although separate arguments and headings in summary judgment motions would be extremely useful to the court and bar, such are not absolutely required

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[2] *See* FED. R. CIV. P. 12(b)(6).

by the rule. If a motion clearly sets forth its grounds and otherwise meets Rule 166a's requirements, it is sufficient. *Id.* The grounds for the Hospital's motion could have been more clearly set forth, but we cannot say the motion fails to meet the rule's requirements. Therefore, based on the Texas Supreme Court's articulations in *Binur* and an indulgent interpretation of the Hospital's motion, we deem the motion sufficient.

Merits of the Appeal

Roberts contends in a number of different issues that summary judgment was erroneously granted because the Hospital's summary judgment evidence did not conclusively prove she failed to meet any element of the Whistleblower Act or that limitations had run.

No Evidence Standards for Review

A no-evidence summary judgment is essentially a pretrial directed verdict. We therefore apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W. 3d 502, 506 (Tex. 2002). We must determine whether the nonmovant produced any evidence of probative force to raise a fact issue on the material questions presented. *Id.; Woodruff v. Wright*, 51 S.W. 3d 727, 734 (Tex. App.-Texarkana 2001, pet. denied). We consider all the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W. 2d 706, 711 (Tex. 1997).

A no-evidence summary judgment is improperly granted if the nonmovant presents more than a scintilla of probative evidence to raise a genuine issue of material fact. *Jackson v. Fiesta Mart, Inc.*, 979 S.W. 2d 68, 70-71 (Tex. App.-Austin 1998, no pet.). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Havner*, 953 S.W. 2d at 711.

Standard Summary Judgment Review

When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the non movant's favor. *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W. 3d 308, 311 (Tex. 2002); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W. 2d 217, 223

(Tex. 1999). On appeal, the movant must show that there is no material fact issue and that the movant is entitled to judgment as a matter of law. *Limestone Prods. Distrib., Inc.*, 71 S.W. 3d at 311; *Rhone-Poulenc, Inc.*, 997 S.W. 2d at 223.

General Background

The lawsuit is based on the application of the Whistleblower Act, which is designed to enhance openness in government and compel the government's compliance with law by protecting those who inform authorities of wrongdoing. *Castaneda v. Tex. Dep't of Agric.*, 831 S.W. 2d 501, 503 (Tex. App.-Corpus Christi 1992, writ denied). The Act evidences two legislative purposes: (1) to protect public employees from retaliation by their

employer when, in good faith, employees report a violation of the law, and (2) in consequence, to secure lawful conduct on the part of those who direct and conduct the affairs of public bodies. *Travis County v. Colunga*, 753 S.W. 2d 716, 718-19 (Tex. App.-Austin 1988, writ denied). Because the Act is remedial in nature, it should be liberally construed to effect its purpose. *Castaneda*, 831 S.W. 2d at 503; *Davis v. Ector County*, 40 F .3d 777, 785 (5th Cir. 1994).

Roberts' Allegations at Trial

In her petition, Roberts alleged that, because she warned her superior and members of the Hospital's governing board that the planned purchase of a CT scannerwas not being made by competitive bid as required by law, her superiors retaliated against her by failing
to assign her to a newly created "lead tech" position, and ultimately terminated her employment. She also complains that the actions by the Hospital's officials were based on their disapproval of her efforts to professionalize her department. She

contends this is shown by their written reactions to her efforts, dating back to 1991, to maintain or create a professional, safe, and fairly administered work environment.

Analysis

The Hospital does not contest the description of the Hospital as a local governmental entity, and admits Roberts was a public employee. That element of the Whistleblower Act is therefore not an issue. Although the Hospital does contend Roberts' actions were not taken in good faith, the evidence on that is in dispute; thus, a fact issue

would exist.[3] Similarly, although the Hospital argues there was no evidence of an adverse personnel action, the summary judgment proof as described above clearly shows a dispute in the evidence on that matter as well.

The controlling issues raised by the Hospital are that Roberts provided nothing to show that: 1) any specific applicable law was violated-thus no evidence of any illegal conduct, and alternatively, if a law was so violated, 2) Roberts never reported such violation to "appropriate law enforcement authority." In the absence of either element, a plaintiff suing under the Whistleblower Act cannot prevail.[4]

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[3] The Hospital suggests that, because Roberts could not specify the exact statute that was violated by a failure to obtain competitive bids, she did not act in good faith. There is an alternative argument that, if no law existed to be broken, then good faith is immaterial, and the specific requirements of the Act are not met. There is some dispute as to whether such a law exists in this case. The Hospital has suggested in a post argument letter brief that, because the Hospital district was created before the codification of the current Health and Safety Code, and thus created by Legislative act rather than by the strictures of the current Code provisions, the competitive bidding requirements set out in the Code do not apply to this entity. That argument is not entirely persuasive, because the entirety of the former statutes that governed the operation of all hospital districts have been repealed and recodified in the Health and Safety Code. *See* TEX. REV. CIV. STAT. ANN. art. 4478, et seq., *repealed by* Act of May 18, 1989, 71st Leg., R.S., ch. 678, 1989 Tex. Gen. Laws 2230 (effective Sept. 1, 1989) (now recodified as the Texas Health and Safety Code). That matter, however, was not adequately raised or briefed by either party to justify full analysis in this opinion, and because of our disposition of this appeal, we will not conclusively address it here. Given the complexity of the law, and noting the Hospital's own careful avoidance of stating that "no law was violated," we will not conclude Roberts was barred from taking the good-faith position that the Hospital was engaged in activities outside the bounds of the law.

[4] We also recognize that yet another oddity exists here: the Hospital did not ultimately carry through with its purchase outside the bounds of competitive bidding, but withdrew the purchase order. It appears the Hospital did then submit the purchase to

In this case, the dispositive question is whether, assuming a law was violated, Roberts reported that violation to an appropriate law enforcement authority so that the Whistleblower Act protections would apply to her situation. The Whistleblower Act provides that an appropriate law enforcement authority is a governmental entity authorized to "regulate under or enforce the law alleged to be violated in the report." TEX. GOV'T CODE ANN. § 554.002(b)(1) (Vernon 2004). Alternatively, an appropriate law enforcement authority is a governmental entity authorized to "investigate or prosecute a violation of criminal law." TEX. GOV'T CODE ANN. § 554.002(b)(2) (Vernon 2004). The language controlling our review was set out recently.

> Under the statutory definition, it is clearly not enough that a government entity has *general* authority to regulate, enforce, investigate, or prosecute. Rather, to determine if a governmental entity qualifies as an "appropriate law enforcement authority," we are bound to construe that term as the statute defines it. *See* TEX. GOV'T CODE § 311.011(b); *Faircloth*, 898 S.W.2d at 274; *Tijerina*, 846 S.W. 2d at 827. And the statute defines that term as a governmental entity authorized to regulate under or enforce *"the law alleged to be violated in the report,"* or to investigate or prosecute *"a violation* of *criminal law."* *See* TEX. GOV'T CODE § 554.002(b). In other words, the particular law the public employee reported violated is critical to the determination.

Tex. Dep't of *Transp. v. Needham*, 82 S.W. 3d 314, 319-20 (Tex. 2002).

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competitive bidding and purchased the scanner recommended by Roberts. One legitimate question is thus whether Roberts actually reported a violation of the law-or whether, by making the report, Roberts saved the Hospital from possible liability by pointing out its impending violation-but by doing so before the violation occurred, she placed herself outside the protection of the Whistleblower Act.

The courts have held that a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:

- regulate under or enforce the law alleged to be violated in the report
- investigate or prosecute a violation of criminal law.

Id. at 319; 3 J. HADLEY EDGAR, JR. & JAMES B. SALES, TEXAS TORTS AND REMEDIES § 45.06[13](c) (2003).

In this case, taking all allegations in the light most favorable to the nonmovant, Roberts simply did not report the alleged violation to an appropriate law enforcement authority. She reported it to her superior, and ultimately to members of the Hospital board. Although it is reasonable to conclude that, like all individuals, these hospital officials have a duty to obey the law, as set out in *Needham* that is not the same as being a governmental entity authorized to regulate under or enforce "the law alleged to be violated in the report," or to investigate or prosecute "a violation of criminal law." *See Needham*, 82 S.W. 3d at 319.

Roberts notes that in her affidavit she states she called the Texas Attorney General's office,[5] and it informed her that she first needed to go though the grievance

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[5] The record indicates Roberts called the Attorney General's office twice. She says she was told in 1991 she would have to lose her job before the Whistleblower Act might apply, and then again at an unspecified date after the purchasing incident when she was told correctly that she had to pursue a grievance process under the Act.

process. Roberts failed to adduce summary judgment evidence that this contact with the Attorney General's office satisfied the underlying requirement that she make a complaint to a law enforcement authority, and as a result of that action alone, the Hospital acted unlawfully by terminating or otherwise affecting her employment. Roberts further failed to provide summary judgment evidence that the Attorney General's office is authorized to regulate under or enforce "the law alleged to be violated in the report." *Id.*

Therefore, under the statute, Roberts has neither pled nor provided summary judgment proof of facts that would support this required element of the action, and a no evidence summary judgment was properly rendered on this basis.

We affirm the judgment.

DONALD R. ROSS
Donald R. Ross
Justice

Date Submitted: February 16, 2005
Date Decided: March 15, 2005

FILED IN
The Court of Appeals
Sixth District
MAR 15 2005
Texarkana, Texas
Linda Rogers, Clerk

APPENDIX B

NO. 29675

Filed For Record
04 Apr 20 AM 10:03
Debra Bowen
District Clerk, Titus Co. Tx.
By *DB* Deputy

JOAN CAROL ELLIS ROBERTS	§	**IN THE DISTRICT COURT**
	§	**IN AND FOR TITUS**
vs.	§	**COUNTY**
	§	
TITUS COUNTY MEMORIAL HOSPITAL	§	**76/276th JUDICIAL DISTRICT**
	§	

FINAL ORDER

Before the Court for consideration is the Motion for Summary Judgment Defendant, Titus County Memorial Hospital. Based upon a review of the Motion and any response thereto, and after being sufficiently advised, the Court finds the Motion well taken and is of the opinion it should be granted, and that all of Defendant's objections are upheld.

IT IS, THEREFORE, ORDERED, that the Motion for Summary Judgment on Plaintiff's Claims brought by the Defendant is, in all things, GRANTED.

This is a final judgment disposing of all parties and all claims for relief. All costs of court are taxed against the Plaintiff for which let execution issue. The Court denies all relief not expressly granted herein.

SIGNED on this the *20th* day of *April*, 2004.

Jimmy L. White
Judge

APPENDIX C

THE STATE OF TEXAS

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 05-0246 DATE: 6/24/2005
COA #: 06-04-00056 - CV TC #: 29675
STYLE: JOAN CAROL ELLIS ROBERTS
v. TITUS COUNTY MEMORIAL HOSPITAL

Today the Supreme Court of Texas denied the petition for review in the above - referenced case.

MAIL TO: JOAN CAROL ELLIS ROBERTS
65 C.R. 1044
MOUNT PLEASANT, TEXAS 75455

THE STATE OF TEXAS

APPENDIX D

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 05-0246 DATE: 8/12/2005
COA #: 06-04-00056 - CV TC #: 29675
STYLE: JOAN CAROL ELLIS ROBERTS
v. TITUS COUNTY MEMORIAL HOSPITAL

Today the Supreme Court of Texas denied the motion for rehearing of the above - referenced petition for review.

Petitioner's motion to take judicial notice of documents is dismissed a moot.

MAIL TO: JOAN CAROL ELLIS ROBERTS
65 C.R. 1044
MOUNT PLEASANT, TEXAS 75455

APPENDIX B

CHAPTER 554. PROTECTION FOR REPORTING VIOLATIONS OF LAW

§ 554.001. DEFINITIONS. In this chapter:

(1) "Law" means:

(A) a state or federal statute;

(B) an ordinance of a local governmental entity; or

(C) a rule adopted under a statute or ordinance.

(2) "Local governmental entity " means a political subdivision of the state, including a:

(A) county;

(B) municipality;

(C) public school district; or

(D) special-purpose district or authority.

(3) "Personnel action" means an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.

(4) "Public employee" means an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity.

(5) "State governmental entity " means:

(A) a board, commission, department, office, or other agency in the executive branch of state government, created under the constitution or a statute of the state, including an institution of higher education, as defined by Section 61.003, Education Code;

(B) the legislature or a legislative agency; or

(C) the Texas Supreme Court, the Texas Court of Criminal Appeals, a court of appeals, a state judicial agency, or the State Bar of Texas.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 1, eff. June 15, 1995.

§ 554.002. RETALIATION PROHIBITED FOR REPORTING VIOLATION OF LAW.

(a) A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.

(b) In this section, a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:

(1) regulate under or enforce the law alleged to be violated in the report; or

(2) investigate or prosecute a violation of criminal law.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 2, eff. June 15, 1995.

§ 554.003. RELIEF AVAILABLE TO PUBLIC EMPLOYEE.

(a) A public employee whose employment is suspended or terminated or who is subjected to an adverse personnel action in violation of Section 554.002 is entitled to sue for:

(1) injunctive relief;

(2) actual damages;

(3) court costs; and

(4) reasonable attorney fees.

(b) In addition to relief under Subsection (a), a public employee whose employment is suspended or terminated in violation of this chapter is entitled to:

(1) reinstatement to the employee's former position or an equivalent position;

(2) compensation for wages lost during the period of suspension or termination; and

(3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.

(c) In a suit under this chapter against an employing state or local governmental entity, a public employee may not recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount that exceeds:

(1) $50,000, if the employing state or local governmental entity has fewer than 101 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(2) $100,000, if the employing state or local governmental entity has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;

(3) $200,000, if the employing state or local governmental entity has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year; and

(4) $250,000, if the employing state or local governmental entity has more than 500 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed

or in the preceding year.

(d) If more than one subdivision of Subsection (c) applies to an employing state or local governmental entity, the amount of monetary damages that may be recovered from the entity in a suit brought under this chapter is governed by the applicable provision that provides the highest damage award.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 3, eff. June 15, 1995.

§ 554.0035. WAIVER OF IMMUNITY.

A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.

Added by Acts 1995, 74th Leg., ch. 721, § 4, eff. June 15, 1995.

§ 554.004. BURDEN OF PROOF; PRESUMPTION; AFFIRMATIVE DEFENSE.

(a) A public employee who sues under this chapter has the burden of proof, except that if the suspension or termination of, or adverse personnel action against, a public employee occurs not later than the 90th day after the date on which the employee reports a violation of law, the suspension, termination, or adverse personnel action is presumed, subject to rebuttal, to be because the employee made the report.

(b) It is an affirmative defense to a suit under this chapter that the employing state or local governmental entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected

under this chapter of a violation of law.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 5, eff. June 15, 1995.

§ 554.005. LIMITATION PERIOD.

Except as provided by Section 554.006, a public employee who seeks relief under this chapter must sue not later than the 90th day after the date on which the alleged violation of this chapter:

(1) occurred; or

(2) was discovered by the employee through reasonable diligence.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

§ 554.006. USE OF GRIEVANCE OR APPEAL PROCEDURES.

(a) A public employee must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing under this chapter.

(b) The employee must invoke the applicable grievance or appeal procedures not later than the 90th day after the date on which the alleged violation of this chapter:

(1) occurred; or

(2) was discovered by the employee through reasonable diligence.

(c) Time used by the employee in acting under the grievance or appeal procedures is excluded, except as provided by Subsection (d), from the period established by Section 554.005.

(d) If a final decision is not rendered before the 61st day after the date procedures are initiated under Subsection (a), the

employee may elect to:

(1) exhaust the applicable procedures under Subsection (a), in which event the employee must sue not later than the 30th day after the date those procedures are exhausted to obtain relief under this chapter; or

(2) terminate procedures under Subsection (a), in which event the employee must sue within the time remaining under Section 554.005 to obtain relief under this chapter.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 6, eff. June 15, 1995.

§ 554.007. WHERE SUIT BROUGHT.

(a) A public employee of a state governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of Travis County.

(b) A public employee of a local governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of any county in the same geographic area that has established with the county in which the cause of action arises a council of governments or other regional commission under Chapter 391, Local Government Code.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 7, eff. June 15, 1995.

§ 554.008. CIVIL PENALTY.

(a) A supervisor who in violation of this chapter suspends or terminates the employment of a public employee or takes an adverse personnel action against the employee is liable for a civil penalty not to exceed $15,000.

(b) The attorney general or appropriate prosecuting attorney may sue to collect a civil penalty under this section.

(c) A civil penalty collected under this section shall be deposited in the state treasury.

(d) A civil penalty assessed under this section shall be paid by the supervisor and may not be paid by the employing governmental entity.

(e) The personal liability of a supervisor or other individual under this chapter is limited to the civil penalty that may be assessed under this section.

§ 554.009. NOTICE TO EMPLOYEES.

(a) A state or local governmental entity shall inform its employees of their rights under this chapter by posting a sign in a prominent location in the workplace.

(b) The attorney general shall prescribe the design and content of the sign required by this section.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 721, § 9, eff. June 15, 1995.

§ 554.010. AUDIT OF STATE GOVERNMENTAL ENTITY AFTER SUIT.

(a) At the conclusion of a suit that is brought under this chapter against a state governmental entity subject to audit under Section 321.013 and in which the entity is required to pay $10,000 or more under the terms of a settlement agreement or final judgment, the attorney general shall provide to the state auditor's office a brief memorandum describing the facts and disposition of the suit.

(b) Not later than the 90th day after the date on which the state auditor's office receives the memorandum required by Subsection (a), the auditor may audit or investigate the state governmental entity to determine any changes necessary to correct the problems that gave rise to the whistleblower suit and

shall recommend such changes to the Legislative Audit Committee, the Legislative Budget Board, and the governing board or chief executive officer of the entity involved. In conducting the audit or investigation, the auditor shall have access to all records pertaining to the suit.

Added by Acts 1995, 74th Leg., ch. 721, § 10, eff. June 15, 1995.

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

APPENDIX F

CAUSE NO. 06-04-00056-CV

IN THE
COURT OF APPEALS
SIXTH COURT OF APPEALS
TEXARKANA, TEXAS

JOAN CAROL ELLIS ROBERTS,
Appellant

vs.

TITUS COUNTY MEMORIAL HOSPITAL
Appellee

ORAL ARGUMENT BEFORE THE HONORABLE JUSTICES
DONALD R. ROSS, JACK CARTER, and
WILLIAM J. CORNELIUS, C.J., RETIRED, SITTING BY
ASSIGNMENT

COURT PROCEEDING CERTIFICATION

I CERTIFY THAT THE FORGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS THAT OCCURRED ON FEBRUARY 16, 2005 IN THE ABOVE - ENTITLED MATTER.

Joan Carol Ellis Roberts
JOAN CAROL ELLIS ROBERTS, PRO SE

SWORN TO AND SUBSCRIBED BEFORE ME BY JOAN CAROL ELLIS ROBERTS, THE UNDERSIGNED NOTARY, ON MAY 11, 2005.

Lycledia D Hall
Notary Public, State of Texas
Commission Expires 8-30-05

Lycledia D Hall
NOTARY PUBLIC, STATE OF TEXAS

MRS. ROBERTS: There would have been no reason for the Supreme Court to apply the *Hart* standard, since they knew *Grabowski* had not alleged a specific law or even a violation of an actual law. But they did. The reason they did is because the Act states the violation of law is to be determined by a good faith review. This court is obligated to follow the Texas Supreme Court and not add to the Law as the Appellee desires.

Turning to Appellees Second no-evidence claim, that I did not make my reports to an appropriate law enforcement authority, I must first object. For that is not an element to be proved. Just as it is not a requirement of the Act to prove the law was actually violated, neither is it a requirement of the Act to prove the report was made to the actual, to the actual law enforcement authority.

The standard of review on this element is the same as previously stated, whether I believed in good faith, that my reports were made to an appropriate law enforcement authority.

In my petition I pleaded facts to support my good faith belief on this issue. In *Celotex*, the court gave, even gave an example of how the movant in a no evidence summary judgment could affirmatively show the absence of evidence in the record to prevent the summary judgment procedure from becoming a tool for harassment. The defendants's motion made no attempt to point to my pleadings in the record, to support their initial burden that no evidence existed, much less controvert my affidavit testimony on this issue.

Appellee relies heavily on *City of Houston v. Kallina*, and I argued that case in my Reply Brief quite vigorously, as I believe the *Kallina* court's decision is an affront to the legislative intent to enhance openness in government and compel the government's compliance with law while allowing government agencies the chance to put and maintain order, with the opportunity to correct its own errors. I'm not going to readdress those points, but I would like to add one additional fact.

MRS. ROBERTS: The majority of employees are not within the decision making cabinet and are rarely privy to all the internal decision making processes, to even know the full scope of ramifications from the information that they do know. That is why the chain of command is so strictly viewed as insubordination if challenged. To Kallina, a report of missing inventory, was just that, missing inventory. Not necessarily stolen, maybe transferred, maybe borrowed. Only one in authority with access to know the full scope of events would have known.

There is no balance, between the employees right to make a report and the employers right to protect itself, when the court requires an employee to ignore the chain of command in one set of circumstances, when only bits and pieces are known, and yet require the employee to follow it in another, when facts become clear. A liberal construction of the Act requires it to be construed in a manner to support the legislative intent and not create more havoc.

In the Third no-evidence claim, Appellee is incorrect that I must prove all the elements listed in *Zimlich*. Nowhere in *Zimlich* does it state I must prove the entire list of examples provided.

THE COURT: Before you get away from the, the law enforcement, your affidavit states, what, what does it – remind us of what your affidavit states with regard to whom you did report it, that in, from your view in good faith was to a law enforcement agency.

MRS. ROBERTS: Well, I've had numerous reports, but the primary one that was probably the culminating factor was initially to my director of my department and a couple of weeks after that to two board members of the Board of Directors of the hospital. That was on the competitive bidding law one, which seems to be the only one that they're kind a debating.

MR. LEWIS: So there is the conundrum Mrs. Roberts finds herself in, in trying to make a whistleblower claim. She doesn't have a law that she can rest her complaint on and since there's no law there is no way to be able to analysis if a report was made to an appropriate law enforcement authority.

THE COURT: So you, you're saying this purchase was not subject to competitive bidding? Requirement?

MR. LEWIS: The ho – the record is silent on what the hospital's prescribed policies and procedures were. But lets assume for the sake for argument that the hospital decides it wants to use competitive purchasing, not because any law decides that, but because it's a good use of public funds to see what the market would provide.

THE COURT: My question is, or is it your position that no law requires it?

MR. LEWIS: Correct, because the enabling legislation is quiet clear, the Hospital prescribes its methods in purchasing.

THE COURT: Well, if there is a provision, ah — in the Texas Health and Safety Code ah — that, ah — provides that a hospital district is subject to the County Purchasing Act.

MR. LEWIS: Well, and the County Purchasing Act is what — as it applies to the Hospital District? I mean that's the issue here. Is that the law that's alleged to been violated — and if so then you look to the county to report any violation of the law, but you have a very specific enabling law that says the Hospital District is the one that decides. Now some — I think hospital district legislations don't have that very specific language.

THE COURT: Do you agree that the Board is the proper authority to receive the report.

MR. LEWIS: The board would be a proper...

THE COURT: In it's official capacity.

MR. LEWIS: The Board would be a proper authority ultimately to receive employee grievances. I do not agree that the governing board is an appropriate law enforcement authority under the Whistleblower Act because the Hospital Board is not in the business of investigating or enforcing criminal laws and they are not in the business of the other element... regulating under of enforcing the law to be violated.

THE COURT: What would be the appropriate authority?

MR. LEWIS: You could easily start with the criminal District Attorney, that would be a good one, since that one covers both the element of regulating under or enforcing the law and investigating or prosecuting a violation of criminal law. If you wanted to assume that the Health and Safety Code provision was specific enough to cover Titus Hospital –- then perhaps the county — governors or the County Board –- possibly — I don't think the evidence would...

THE COURT: Did she report this to the Attorney General?

MR. LEWIS: No –- there is no evidence of that.

THE COURT: Or was that in the other case, I, I thought —

MR. Lewis: They do blur don't they.

MRS. ROBERTS: First of all he speaks of ah --- I believe it was Lane. All of those cases that he's referred to as far as the law, they all go back to the Supreme Court decision in Grabrowski. Every case that they've cited in their briefs, they're all founded on Grabrowski --- that's the progeny for all those cases and Grawbrowski is the only one that is a Supreme Court decision and that, as I just covered, is the one that the Supreme Court knew in that case --- there was no actual law violated --- that Mr. Grabrowski even admitted he didn't even know of a law that was violated and the Supreme Court still --- knowing that --- applied the standard of good faith from the Hart --- that they had worked out in the Hart case. So it is --- the standard of review is the good faith issue.

As far as him saying ah --- there is ah --- no evidence ah --- of causation --- my first retali --- the first retaliation I received was ah --- was a very much libelous adverse counsel on June 8th after the report on May 3rd and then the promotion followed after that ah --- and to say that I didn't substantiate any ah --- provided no proof of that, I gave the memo, the memorandums that the Lead Tech issued threatening disciplinary action and outlining the duties, there was objective evidence on that to show that, that was a pretext.

Ah --- and as far as the actual law, they did not --- it would have been very simple for them to come out and show what the Hospital policy was to try to negate that there was no policy. They never tried to do that.

And my good faith belief on what the law was... was from a previous purchase back in 1995 I was somewhat involved in on a CAT scan machine, and my Director at that time, when there was some question about what we were going to go with, at that time he informed me that ah --- it was the law that they had to follow ah --- that they had to summit bids and ah --- would have to take the lowest competent bid. He told me that and based on --- that was my whole --- I had never seen an actual law in writing.

MRS. ROBERTS: I didn't know of the name of the actual law, I admit that and ah --- but that's what he told me. I had no reason to believe he was lying to me and ah --- and that's what I was going on. When I knew --- and it's not so much the culmination of the actual bid that went through, but the procedures, there are procedures that you go through in the beginning ah --- and that is giving everyone a fair shot before you even give them the bid. There's certain procedures, you, you do have to, to ah --- consider the different bids, you don't just --- you know --- you can't let one come out and make a presentation and others not do that, it's not a fair playing ground that way. So ah --- but as far as ah --- they had the opportunity to respond, that was in my pleading, that was in --- that was in my pleading, that was in my summary judgment response, but they never submitted any evidence what soever to show what the real procedure --- what their guidelines were --- to show --- to prove that it wasn't the law and really after I, in a no evidence summary judgment after I brought that into question they should have come forward with evidence to prove that I was wrong to, to conclusively prove if that was the fact. But, again it all goes back to good faith from the Supreme Court decision in Grabrowski.

And ah... as far as to the appropriate authority --- when I called the first Board Member, he told me to call the Director, I mean of the head of the finance committee. He told me to do that and that's why I called the second Board Member because that's what he told me to do. Ah --- again that's a good faith issue and nowhere in the Act ah --- when it talks about --- in my brief I've quite --- talked about the ah --- to report it to "an" law enforcement authority and then there's the word "the" law enforcement authority, it's only referred to "the" one time and the other two times in the Act it's referred to "an" and "an" is an indefinite article and ah --- it could mean it could be a part, it doesn't have to be the whole board.